Supreme Court, U.S.
FILED
OCT 29 2008
OFFICE OF THE CLERK

110

No. 08-579

IN THE

Supreme Court of the United States

CYRIL H. WECHT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITION FOR A WRIT OF CERTIORARI

David R. Fine
K&L GATES LLP
Market Square Plaza
17 North Second St.
18th Floor
Harrisburg, PA 17101
(717) 231-4500

Jerry S. McDevitt
(Counsel of Record)
Richard L. Thornburgh
Mark A. Rush
K&L GATES LLP
Henry W. Oliver Building
535 Smithfield Street
Pittsburgh, PA 15222
(412) 355-6500

Counsel for Petitioner
Cyril H. Wecht

QUESTIONS PRESENTED

After a criminal trial in which the government had a full and fair opportunity to make its case, the jury deliberated and did not reach a guilty verdict on any of 41 counts. The district judge declared a mistrial based on a purported jury deadlock but without complying with any of the mandatory provisions of Federal Rule of Criminal Procedure 26.3 (consulting with counsel and canvassing alternatives to a mistrial). Despite what it called "a highly flawed set of procedures" and this Court's admonition that, in double-jeopardy cases, doubts should be resolved "in favor of the liberty of the citizen," the Third Circuit found "manifest necessity" for the mistrial and held that Petitioner could be retried without offense to the Double Jeopardy Clause.

The questions presented are as follows:

1. Whether in a criminal case the government can meet its "heavy" burden to justify a retrial notwithstanding the Double Jeopardy Clause when the district judge not only *sua sponte* declared a mistrial without complying in any respect with Federal Rule of Criminal Procedure 26.3 but also actually prohibited the defendant from voicing any objections to the discharge of the jury.

2. Whether the Court should revisit *United States v. Perez* – which is cited for the principle that the Double Jeopardy Clause does not bar a retrial when a jury does not unanimously agree on a verdict – and determine that the holding attributed to *Perez* is inconsistent with modern double-jeopardy jurisprudence.

LIST OF PARTIES

Petitioner is Cyril H. Wecht. Respondent is the United States of America.

TABLE OF CONTENTS

Page

Questions Presented i

List of Parties ii

Table of Contents iii

Table of Authorities v

Opinions Below 1

Jurisdiction 1

Constitutional Provisions and Rules Involved 1

Statement of the Case 2

Factual Background 2

Proceedings Below 10

Reasons for Granting the Writ 17

I. The court of appeals' judgment is inconsistent with this Court's jurisprudence in holding that a mistrial may be supported by manifest necessity when the district judge failed to comply in any respect with Fed. R. Crim. P. 26.3 17

II. This Court should clarify and make consistent its double jeopardy jurisprudence by holding that, where a jury reaches a deadlock after the government has had a full and fair opportunity to present its case, jeopardy terminates and there can be no retrial 26

Conclusion 35

TABLE OF APPENDICES

Appendix A – Opinion of the United States Court of Appeals for the Third Circuit entered September 5, 2008 ..... 1a

Appendix B – Order of the United States District Court for the Western Pennsylvania entered April 29, 2008 ..... 42a

TABLE OF AUTHORITIES

CASES

Page

Abney v. United States, 431 U.S. 651 (1977) 1

Arizona v. Washington,
434 U.S. 497 (1978) ..... *passim*

Crist v. Bretz, 437 U.S. 28 (1978) 28, 29, 31

Downum v. United States,
372 U.S. 734 (1963) 17, 29

Dreyer v. Illinois, 187 U.S. 71 (1902) 27

Gori v. United States, 367 U.S. 364 (1961) 32

Illinois v. Somerville, 410 U.S. 458 (1973) 31

Keerl v. Montana, 213 U.S. 135 (1909) 27

Logan v. United States, 144 U.S. 263 (1892) 27

Mitchell v. Forsyth, 472 U.S. 511 (1985) 34

Nixon v. Fitzgerald, 457 U.S. 731 (1982) 34

Richardson v. United States,
468 U.S. 317 (1984) 28

United States v. Allick,
274 Fed. Appx. 128 (3d Cir. 2008) 21

United States v. Altieri,
278 Fed.Appx. 53 (2d Cir. 2008) 24

United States v. Berroa, 374 F.3d 1053
(11th Cir. 2004) .....*passim*

United States v. Charlton,
502 F.3d 1 (1st Cir. 2007)..... 24

United States v. Felton,
262 Fed. Appx. 195 (11th Cir. 2008)..... 21

United States v. Green,
355 U.S. 184 (1957) 18, 31

United States v. Jorn,
400 U.S. 470 (1971) 18, 19, 22, 31

United States v. Keene,
287 F.3d 229 (1st Cir. 2002)..... 24

United States v. Mark, No. 08-1177,
2008 WL. 2673869 (3d Cir. July 9, 2008) 24

United States v. Medina,
175 Fed. Appx. 541 (3d Cir. 2006) 21

United States v. Perez,
22 U.S. (9 Wheat) 579 (1824) .....*passim*

United States v. Razmilovic,
507 F.3d 130 (2d Cir. 2007)..... 21, 24

United States v. Rivera,
384 F.3d 49 (3d Cir. 2004) 21

United States v. Sybal,
468 F. Supp. 2d 219 (D. Me 2007) 24

United States v. Vaiseta,
333 F.3d 815 (7th Cir. 2003) 24

United States v. Wecht,
541 F.3d 493 (3d Cir. 2008) ..... *passim*

Wade v. Hunter, 336 U.S. 684 (1949) 27, 31

FEDERAL STATUTES AND RULES

28 U.S.C. § 1254(1) 1

18 U.S.C. § 3231 1

Fed.R.Crim.P.26.3 ..... *passim*

Petitioner Cyril H. Wecht respectfully requests that the Court enter a writ of *certiorari* to the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The precedential opinion of the Third Circuit (Appendix A) is available at *United States v. Wecht*, 541 F.3d 493 (3d Cir. 2008). The district court's order (Appendix B) was not reported in the Federal Supplement. It is available at 2008 U.S. Dist. LEXIS 34957 (W.D. Pa. April 29, 2008). Dr. Wecht filed a motion to stay the entry of the court of appeals' mandate, and the court of appeals denied the motion by order of September 23, 2008.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The Third Circuit had jurisdiction under the collateral-order doctrine. *See Abney v. United States*, 431 U.S. 651, 659 (1977). The Third Circuit entered its judgment on September 5, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The Fifth Amendment of the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any

> person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rule of Criminal Procedure 26.3 provides as follows:

> Before ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives.

STATEMENT OF THE CASE

Factual Background

Petitioner Cyril H. Wecht is a 77-year-old, nationally recognized pathologist and the former coroner of Allegheny County, Pennsylvania.

The government indicted Dr. Wecht on January 20, 2006, and originally accused him in an 84-count indictment of theft of honest services, mail fraud, wire fraud and theft from an organization receiving federal funds. After a significant amount of pretrial activity, the criminal trial began with jury selection on January 10, 2008. The government moved to dismiss 43 counts on the eve of trial, and the district judge dismissed those counts with prejudice after the jury was empanelled. Jury selection concluded on January 23, 2008, and the jurors were sworn that day. The trial began with opening statements on January 28, 2008.

During the next seven weeks, the government called 44 witnesses and offered thousands of pages of exhibits. When the government rested on March 11, 2008, the defense immediately rested as well and called no witnesses of its own.

On March 17, 2008, counsel delivered closing arguments and the district judge instructed the jury. The instructions did not include any direction that the jury could reach a partial verdict. The jury began its deliberations the next day. The trial judge generally permitted the jury to establish the hours of its deliberations and did not require the jury to deliberate on Fridays.

The following week, the jury sent the district judge a note that read as follows: "Out of the 41 counts, if any one or more counts the jury cannot come to unanimous agreement on, does that constitute a hung jury?" The district judge consulted with counsel and, with their consent, sent the following written response to the jury: "The answer to your question is no. It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to your individual judgment..."

A week later, on Thursday, April 3, 2008, the jury sent two notes to the district judge. Only the second is relevant for present purposes. The district judge announced the second note to the parties at the close of jury deliberations that week. That note included the following:

> After considering all counts and in a variety of ways, and in reconsideration of all of individual opinions according to the court *[sic]* instructions – we have

> unanimously agree *[sic]* we have reached an impasse & respectfully request direction from the Court. We agree additional deliberation would not be helpful.

The district judge told counsel that he was inclined to poll the jurors individually to confirm that they were "hopelessly deadlocked" and that no further deliberations would lead to a unanimous verdict and, once done, then read to the jury the "standard deadlock jury charge" in Model Instruction 9.05 of the Third Circuit's model criminal jury instructions.[1] Before he took those steps, however, the judge allowed both the government and the defense time to consider the issue.

In response, the government's counsel requested a partial-verdict instruction. Defense counsel expressed the view that a mistrial should be declared if the jury confirmed it was hopelessly deadlocked and that further deliberations would not produce a verdict. The district judge denied both oral requests.

The district judge told counsel he would bring in the jurors, poll them, give them the Instruction-9.05 charge and then send them back to deliberate. The district judge had the jurors return to the courtroom. He polled them individually, and each responded that he or she believed the jury to be hopelessly deadlocked such that additional deliberations would not be helpful. The district judge then read to them from the Third Circuit's Model

---

[1] The Third Circuit's model instructions were prepared by a committee of district judges with the advice of an advisory panel. The Third Circuit has not endorsed the model instructions.

Criminal Jury Instruction 9.05 and sent them back to their deliberations.[2]

A short time later, the district judge recessed the matter until the following Monday, April 7, 2008.

On the afternoon of Thursday, April 3, 2008, after formal proceedings recessed, the government filed a motion again requesting that the district judge give the jury a partial-verdict instruction (in essence, restating in writing the motion made orally in court earlier that day).

In a written filing on April 4, 2008, Dr. Wecht objected to the proposed instruction and cross-moved for a mistrial. Later that day, the district judge denied the government's partial-verdict request.

On Monday, April 7, 2008, after the jury resumed deliberations, the district judge denied Dr. Wecht's motion for a mistrial.

The jury deliberated for four hours on Monday, April 7, 2008. Shortly before 9:00 a.m. the next morning, April 8, 2008, the district court clerk summoned counsel to the courtroom with an entry on the court's electronic docket that did not describe the purpose of the court appearance.

When the parties and counsel appeared, the bailiff brought the jurors into the courtroom. The district judge then entered the courtroom, took the bench, and stated as follows:

---

[2] The district judge did not and has not since explained why he conducted the April 3, 2008, proceedings in the order in which he did (*i.e.*, consulting with counsel and deciding to send the jury back to deliberate *before* questioning the jurors).

THE COURT: Good morning. Thank you all for gathering pursuant to the notice on the Electronic Case Filing system.

For your and the jury's safety and the preserved good order, I would ask that you follow the following instructions this morning:

Everyone should remain in their seats throughout this proceeding from now until when the jury and I exit the courtroom.

No one will be permitted to be running in and out of the courtroom as happened last week.

Secondly, I expect everyone to be quiet, and if anyone wants to make motions or objections to this proceeding or whatever, they may do so in writing on ECF, as we have done throughout the trial.

If anyone is unwilling to abide by these instructions, I will give you time now to exit.

Thank you for your assistance and cooperation.

The jury has informed the bailiff that they remain hopelessly deadlocked and are unable to reach a unanimous verdict on the defendant's guilt on any of the 41 counts and are unable to reach

a unanimous verdict on the defendant not being guilty of any of the 41 counts.

The jurors' note will be marked as Court Exhibit 13, and I have copies thereof, which you can pick up when we're done with this proceeding, which has deleted the names of presumably the foreperson and secretary.[3]

***

Thus, defendant is still charged with each of the 41 counts with the constitutional presumption of innocence as to each of the 41 counts.

It is the government's responsibility to decide whether or not to retry the defendant.

Does the government have a decision today whether the government will retry the defendant?

[THE GOVERNMENT]: We do, Your Honor, and we will.

THE COURT: I would ask that by Friday at noon that the government file a notice as to which of the counts, which could be as few as one or as many

---

3 In its totality, the jury's final note read as follows:

Pursuant to court instructions the jury contends that we have exhausted all further deliberation efforts. We agree unanimously that we are unable to reach a verdict – on all 41 counts and are essentially deadlocked in the case of United States of America vs. Cyril H. Wecht.

as the 41, which of the counts will be tried in the retrial.

Is the government prepared to proceed immediately to retry the case?

[THE GOVERNMENT]: We are, Your Honor.

THE COURT: Is the defense prepared to immediately retry the case?

[DEFENSE COUNSEL]: We will have several motions to make before that happens.

THE COURT: Okay. Just for everyone's scheduling purpose, I will set the trial for May 7th – excuse me – May 27th, which is the day after Memorial Day, May 27, 2008, at nine a.m.

That should give defense and the government sufficient time to file whatever motions they wish to respectively file.

On behalf of the defendant, when would you like to file any motions you wish to file, sir?

[DEFENSE COUNSEL]: I will need some time to think about that. This is quite a surprise.

> THE COURT: Okay. I know everyone needs a little rest, so I appreciate that matter.
>
> I would ask the defense, if you would kindly for me, please file any motions you have by noon on April 18, 2008.
>
> If you find after reflection that date doesn't work for you, then just file an appropriate motion, and I will work with you in that regard.
>
> I will send out a scheduling order as to the May 27th, 2008 date without prejudice to whatever defendant's motions will come before me.
>
> *Before I declare a mistrial and discharge the jury,* I wish to express several things.
>
> First of all, I want to thank our wonderful court reporters . . .

Wecht, 541 F.3d at 497-99 (emphasis added). (Appx A at 7a-11a) The district judge then thanked various court personnel and the jurors. After concluding those remarks, he made the following statement: "I declare a mistrial. I discharge the jury and the alternate jury . . ." Importantly, the jurors were present for the entire proceeding.

As the transcript demonstrates, the district judge began the mistrial proceeding by expressly ordering counsel to remain quiet, to make no motions and to offer no objections.

He told counsel that the jurors had indicated that they were "hopelessly deadlocked" when, in fact, their note said "essentially deadlocked." The district judge also characterized the jurors as having said they could not reach unanimity on "*any* of the 41 counts" (emphasis added) when, in fact, the jurors' note said they could not reach unanimity on "*all* of the 41 counts" (emphasis added).[4] The district judge did not question the jury foreman or any other member of the jury.

The district judge made no effort to consult with counsel about whether a mistrial was appropriate or, for that matter, to seek counsels' consent to a mistrial or counsels' suggestions about whether there might be some alternative to a mistrial. Indeed, as noted, the district judge began the proceeding by ordering all present to remain silent and to offer no motions or objections.

Proceedings Below

On April 14, 2008, Dr. Wecht filed in the district court a motion to dismiss the indictment and preclude the government from further prosecution in violation of the double-jeopardy provisions of the Fifth Amendment.

The district judge denied the motion on April 29, 2008. In his order denying the motion (Appx B), he offered a number of rationales. The

---

[4] As noted in the transcript, the district judge only made copies of the jury's final note available to counsel *after* the conclusion of the proceeding in which he declared a mistrial. Thus, counsel could not have known during the proceeding that the note said "essentially deadlocked" rather than "hopelessly deadlocked" or "all of the 41 counts" rather than "any of the 41 counts."

district judge first asserted that, because Dr. Wecht had moved for a mistrial the previous week, he somehow consented to the *sua sponte* entry of a mistrial on April 8, 2008 (even though the district judge had denied Dr. Wecht's motion the day before entering the mistrial order). The district judge further asserted that Dr. Wecht somehow consented to the mistrial because, during the April 8, 2008, proceeding, his counsel did not violate the district judge's express order that there be no motions or objections.

The district judge then asserted that "it cannot be seriously disputed that the jury was hopelessly deadlocked" and that "[t]here can be *no doubt*, on the record before this Court, that over a five day period, this Court fully and faithfully complied with Fed.R.Crim.P.26.3 in letter and in spirit" (emphasis original). (Appx B at 67a)

On April 29, 2008, Dr. Wecht filed his notice of appeal to the Third Circuit. On the same day, he filed a motion in the district court seeking a stay of the retrial pending appeal. The district judge denied the stay, asserting that the appeal was "frivolous," but the court of appeals granted a stay less than a week later.

Dr. Wecht argued on appeal that the district judge's process in declaring the mistrial was so procedurally irregular that the record created by that process could not support a finding of manifest necessity.

Dr. Wecht first argued that the district judge's failure to comply with the mandates of Rule 26.3 was fatal to the mistrial declaration – and hence precluded any attempt to retry Dr. Wecht.

Dr. Wecht additionally argued that, in addition to the Rule 26.3 violation, there were other significant errors in the mistrial process that mandated dismissal of the indictment on double-jeopardy grounds.

For example, the jury's final note referred to the panel as having been "essentially" deadlocked, a phrasing that should have engendered questions of the jurors about whether their perceived deadlock was hopeless or momentary. Similarly, the fact that the jurors wrote in their final note that they could not reach unanimity "on all 41 counts" should have prompted a question to the jury to determine if it understood its authority to render a partial verdict. The district judge asked none of those questions. He did not show the note to counsel and he did not consult with counsel about their positions on a mistrial or the availability of any alternatives to a mistrial. He did not seek, or obtain, Dr. Wecht's consent to a mistrial declaration, and he did not offer Dr. Wecht any opportunity to suggest alternatives. Thus, although this Court has held that the government bears a "heavy" burden to justify a mistrial, the record created in the district court was so scant that the government could not meet its burden.

The court of appeals (Judges Smith, Fisher and VanAntwerpen) held oral argument on August 4, 2008. At the argument, counsel for the government expressly waived any argument that Dr. Wecht consented to the mistrial. Thus, the sole issue for the Third Circuit was whether there was "manifest necessity" for the mistrial when, on the day of the *sua sponte* mistrial declaration, the district judge complied with absolutely none of the mandatory requirements of Rule 26.3.

The Third Circuit delivered its decision on September 5, 2008. The court divided its opinion into an examination of the "ideal" procedure for a district judge to employ before declaring a mistrial and then an examination of what the district judge did in this case (a section the court of appeals labeled "The Violation"). The Third Circuit's opinion included the following determinations:

- "[T]he District Court did not come close to following [Federal Rule of Criminal Procedure] 26.3 at the April 8, 2008 proceeding. First, it did not show or read to counsel verbatim the second jury note until after mistrial was already declared. Second, it explicitly instructed counsel 'to be quiet, and if anyone wants to make motions or objections to this proceeding or whatever, they may do so in writing on ECF, as we have done throughout the trial.' Third, it announced the new development and its corresponding intentions in the jury's presence. At no time during that proceeding did the District Court solicit counsel's views as to the propriety of the impending mistrial declaration. The lack of information to counsel rendered difficult their ability to make an informed decision; the effective gag order rendered difficult any attempt by counsel to urge the District Court to follow Rule 26.3 at that time; and the fact that this all occurred in the jury's presence rendered difficult the ability of defense counsel to object or even ask for a sidebar, for fear that the jury would blame the defense for prolonging its term of service." *Wecht*, 541 F.3d at 503. (Appx A at 21a-22a)

- The district judge "did not question the foreperson, poll the jurors individually, or 'hold a hearing with counsel and the defendant' outside the presence of the jury." 541 F.3d at 501-02. (Appx A at 18a)

- The district judge "did not make an explicit finding of manifest necessity under the seven factors listed in the third step of Comment 9.06, prior to calling the jurors back into the courtroom and discharging them." 541 F.3d at 502. (Appx A at 19a)[5]

Having concluded that the district judge engaged in "a highly flawed set of procedures," 541 F.3d at 511 (Appx A at 39a), the court of appeals then considered what remedy – if any – it would provide.

The Third Circuit first held that, while the requirements of Rule 26.3 are mandatory, "a violation of Rule 26.3 does not always mean that a mistrial was declared improperly as a matter of constitutional law, and accordingly hold that the remedy for a violation of Rule 26.3 is not automatically the dismissal of the indictment." 541 F.3d at 504. (Appx A at 24a) The Third Circuit's holding in this regard followed the Eleventh Circuit's

---

[5] The third step to which the court of appeals referred requires the district court to consider the following seven factors: (1) a timely objection by the defendant; (2) the jury's collective opinion that it cannot agree; (3) the length of jury deliberations; (4) the length of trial; (5) the complexity of the issues presented to the jury; (6) any proper communications between the judge and jury; and (7) the effects of exhaustion and the impact of coercion of further deliberations on the jury. *See* Third Circuit Model Criminal Jury Instruction 9.06 (available on the Third Circuit's web site at www.ca3.uscourts.gov).

holding in *United States v. Berroa*, 374 F.3d 1053 (11th Cir. 2004) (*cert. denied*, 543 U.S. 1076 (2005)).

In essence, the Third Circuit in this case followed the Eleventh Circuit's approach in *Berroa:* it held that the Rule-26.3 violation lessened the deference given to the district judge's determination of manifest necessity, but that the court of appeals could itself review the record to determine if there was manifest necessity for the mistrial.[6]

Here, the Third Circuit gave greatest weight to the issue of "the jury's collective opinion that it cannot agree." *Wecht*, 541 F.3d at 509. (Appx A at 34a) The court of appeals focused on the two notes from the jury – the first from April 3 and the second from April 7. The court held that it would be "counterintuitive" to read the April 7 note (referring to the jury being "essentially deadlocked") as calling into question the hopelessness of the jury's purported deadlock. 541 F.3d at 509. (Appx A at 35a) Similarly, in response to the ambiguity in the jury's note regarding its inability to reach a unanimous verdict "on all 41 counts," the court of appeals held that "[w]e believe the likelihood of this understanding is low." *Id.* In doing so, the court of appeals erroneously stated that the trial judge had given a partial verdict instruction, citing to the original charge to the jury following closing argument.[7] 541 F.3d at 509. (Appx A at 35a-36a)

---

[6] The Third Circuit's opinion in this case and the Eleventh Circuit's opinion in *Berroa* share another common point: it is essentially impossible to discern from either opinion what standard of review the appeals courts ultimately employed.

[7] No partial verdict instruction was ever given the jury—not in the original instruction and not in response to any notes sent out by the jury. As noted, the trial judge refused to do so

The court of appeals then noted that the jury deliberated for 54.5 hours over 10 days after a 23-day trial and concluded that "the amount of deliberation time corresponded sufficiently to the length and complexity of the trial..." 541 F.3d at 509-10 (Appx A at 36a-37a) Finally, the appeals court held that the record of communications between the district judge and the jury – including the April 3 polling that the court of appeals held did not satisfy Rule 26.3 – supported a finding of manifest necessity. 541 F.3d at 510. (Appx A at 37a)

Accordingly, the Third Circuit held that there was manifest necessity and it affirmed the denial of Dr. Wecht's motion to dismiss the indictment and preclude further prosecution.

The court of appeals concluded its opinion, however, by exercising its supervisory powers to remove the trial judge from further duties on the case in order that any further proceedings would be presided over by a "less invested adjudicator."[8] 541 F.3d at 511-12. (Appx A at 39a-40a)[9]

---

twice prior to the day the mistrial was granted and did not seek the parties' view on whether such an instruction was proper in light of the note sent out the day the mistrial was declared.

[8] The Third Circuit also noted the unusual nature of the trial judge's procedures throughout the case, some of which were noted in a prior opinion of the Third Circuit denying a pretrial motion to have the trial judge recused. Among other things, those procedures included the *en masse* admission of hundreds of thousands of pages of government exhibits long before trial in an evidentiary vacuum. *See United States v. Wecht*, 484 194, 217 (3d Cir. 2007)

[9] Dr. Wecht filed a motion asking the Third Circuit to stay the issuance of its mandate pending a petition to this Court for a writ of *certiorari*. The court of appeals denied the motion on September 23, 2008. The mandate issued on October 27, 2008.

As of the date on which this petition is being filed, the district court has not scheduled a retrial.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' JUDGMENT IS INCONSISTENT WITH THIS COURT'S JURISPRUDENCE IN HOLDING THAT A MISTRIAL MAY BE SUPPORTED BY MANIFEST NECESSITY WHEN THE DISTRICT JUDGE FAILED TO COMPLY IN ANY RESPECT WITH FED. R. CRIM. P. 26.3.

The Court has on a number of occasions held that a mistrial must be accompanied by "manifest necessity" for there to be a retrial that does not offend the Double Jeopardy Clause.[10] The Court has emphasized that the government bears a "heavy" burden to prove that there was manifest necessity and that close cases are to be resolved in favor of the liberty of the defendant.[11]

In its modern double-jeopardy jurisprudence, the Court has described the important values underlying the constitutional right. In *Green v. United States*, the Court described the first of these policies:

---

[10] *See, e.g., Arizona v. Washington*, 434 U.S. 497 (1978). While Dr. Wecht argues in the next section of this petition that the "manifest necessity" standard utilized in double-jeopardy jurisprudence arises from an ancient precedent that did not in fact address any constitutional provision, for purposes of this section of his petition, Dr. Wecht assumes as binding extant double-jeopardy jurisprudence.

[11] *See Arizona v. Washington*, *supra* (heavy burden), and *Downum v. United States*, 372 U.S. 734, 737 (1963) (close cases to be resolved in defendant's favor).

> The underlying idea, one that is deeply engrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting [the defendant] to embarrassment, expense and ordeal and compelling [the defendant] to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent [the defendant] may be found guilty.

355 U.S. 184, 187-88 (1957). In *United States v. Jorn*, the Court described a second, and equally important, value embedded in the guarantee that no person shall "be subject for the same offense to be twice put in jeopardy . . .", specifically a defendant's right to have his trial completed by the particular tribunal that has heard the government's evidence against him.

> If that right to go to a particular tribunal is valued, it is because, independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial...In the absence of [a defense motion for a mistrial], the *Perez* doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial

> discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings.

400 U.S. 470, 485 (1971). In *Arizona v. Washington*, the Court reinforced the point:

> Because jeopardy attaches before the judgment becomes final, the constitutional protection also embraces the defendant's "valued right to have [the] trial completed by a particular tribunal."... Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

434 U.S. 497, 503-05 (1978) (quotation omitted).[12]

Thus, the Court's modern double-jeopardy jurisprudence recognizes two constitutional principles for the benefit of those the government targets for prosecution: recognition that the general rule is that the prosecutor generally gets "one, and only one" opportunity to prove his case and the defendant's associated right to have a trial completed by one tribunal. The prosecutor does not get a second chance, and the defendant does not lose his right to have his trial completed by the chosen jury unless the trial judge scrupulously exercises his discretion

---

[12] In *Arizona v. Washington*, which was not a case involving a deadlocked jury, the Court explained that the "valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury." 434 U.S. at 505.

and then concludes that the ends of public justice are not served by continuing the proceedings.

These core principles of modern double-jeopardy jurisprudence are embodied in the mandatory provisions of Federal Rule of Criminal Procedure 26.3, enacted in 1993, and in a variety of procedural protections implemented by the courts of appeals.

Rule 26.3 mandates as follows: "Before ordering a mistrial, the court *must* give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives" (emphasis added). The advisory committee notes accompanying the rule elaborate on the point.

> Rule 26.3 is a new rule designed to reduce the possibility of an erroneously ordered mistrial which could produce adverse and irretrievable consequences. The Rule is not designed to change the substantive law governing mistrials. Instead it is directed at providing both sides an opportunity to place on the record their views about the proposed mistrial order. In particular, the court must give each side an opportunity to state whether it objects or consents to the order.
>
> ***
>
> The Rule ensures that a defendant has the opportunity to dissuade a judge from declaring a mistrial in a case where granting one would not be an abuse of discretion, but the defendant believes

> that the prospects for a favorable outcome before that particular court, or jury, are greater than they might be upon retrial.

1993 Advisory Committee Note to Fed. R. Crim. P. 26.3. Put another way, the rule mandates that the district judge exercise scrupulous care before discharging the defendant's chosen jury and the allowing the prosecution yet another opportunity before a different jury. To ensure that scrupulous care, Rule 26.3 demands that the trial judge give counsel an opportunity to protect the constitutional rights of the accused and the values noted by this Court. Indeed, the rule recognizes that, even when the district judge might be within his discretion to order a mistrial, counsel must be given the opportunity to argue against that exercise of discretion.

The courts of appeals have added additional steps to those commanded by Rule 26.3 when the proposed mistrial is in response to a potentially deadlocked jury, all of which are aimed at ensuring the scrupulous care required of the trial judge to protect, not defeat, those core constitutional values. For example, the federal appellate courts call upon district judges to question the jurors about the state of their deliberations and the likelihood that a present deadlock is "hopeless." *See, e.g., United States v. Razmilovic*, 507 F.3d 130, 138-39 (2d Cir. 2007).

This Court has not yet addressed the consequence of a complete failure to follow the non-discretionary procedures of Rule 26.3, an issue of considerable import given its constitutional underpinnings. Moreover, despite the clear and

mandatory procedures embodied in Rule 26.3, there is a troubling number of cases in which district judges have simply not abided by its command and thereby caused interlocutory appeals prior to any purported retrial.[13] There is simply no legitimate reason for trial judges to be ignoring the mandatory language of a rule with decidedly constitutional overtones expressly directed only at them, and conversely there is ample reason for this Court to act in its supervisory power to correct such practices given the harm to both the accused and the systemic concerns raised by ignoring such a clear rule. The Court should conclude that a mistrial declared without any compliance with Rule 26.3 cannot be said to have been supported by manifest necessity, particularly when the defendant is not given the opportunity to object to the discharge of the tribunal and certainly when his counsel is affirmatively told he cannot register any objection.

Both the Third Circuit in this case and the Eleventh Circuit in *Berroa* erred in concluding that Rule 26.3 does not embody a constitutional protection such that its studied violation negates any finding of manifest necessity. This Court has suggested otherwise. For example, in *United States v. Jorn*, 400 U.S. 470 (1971), the court found that

---

[13] In just the past four years, the Third Circuit has addressed four cases in which district judges failed to comply with Rule 26.3's mandatory procedures. *See Wecht*, 541 F.3d 493; *United States v. Allick*, 274 Fed. Appx. 128 (3d Cir. 2008); *United States v. Medina*, 175 Fed. Appx. 541 (3d Cir. 2006), and *United States v. Rivera*, 384 F.3d 49 (3d Cir. 2004). The problem arises with frequency in other circuits as well. *See, e.g., United States v. Berroa*, 374 F.3d 1053 (11th Cir. 2004); *United States v. Felton*, 262 Fed. Appx. 195 (11th Cir. 2008); *see generally, United States v. Razmilovic*, 507 F.3d 130 (2d Cir. 2007) (not expressly referring to Rule 26.3 but describing a failure to comply with the rule's requirements).

double-jeopardy precluded a mistrial in part because the district judge refused to hear from counsel. 400 U.S. at 487. The trial judge's failure to consider alternatives to a mistrial was similarly a factor in the Court's decision in *Jorn*. *Id.* In *Arizona v. Washington*, on the other hand, the Court found that

> The trial judge did not act precipitately in response to the prosecutor's request for a mistrial. On the contrary, evincing a concern for the possible double jeopardy consequences of an erroneous ruling, he gave both defense counsel and the prosecutor full opportunity to explain their positions on the propriety of a mistrial. We are therefore persuaded by the record that the trial judge acted responsibly and deliberately, and accorded careful consideration to respondent's interest in having the trial concluded in a single proceeding.

434 U.S. at 515-16. The Court has found that the trial judge's conferral with counsel is a critical element in determining whether the defendant's constitutional right to have his trial conclude before a single tribunal has been appropriately protected by the requisite scrupulous care.[14]

---

[14] In *Berroa*, the Eleventh Circuit supported its conclusion that Rule 26.3 does not itself have constitutional underpinnings by referring to the advisory committee note that indicates that the rule was not intended to do anything but codify existing principles. The Eleventh Circuit's analysis stopped there and erred in doing so because those existing principles are squarely rooted in the constitutional values established by this Court.

There is another reason Rule 26.3's mandate that the district judge confer with counsel should be understood to implement a constitutional requirement. As the advisory committee notes indicate, "[t]he Rule ensures that a defendant has the opportunity to dissuade a judge from declaring a mistrial in a case where granting one would not be an abuse of discretion, but the defendant believes that the prospects for a favorable outcome before that particular court, or jury, are greater than they might be upon retrial." Thus, the consultation requirement serves two purposes: it allows the defense to argue that that a mistrial is not manifestly necessary in that, for example, there are alternatives to a mistrial; and it allows the defense to argue that, even if the judge would be acting within his discretion in declaring a mistrial, he still should not do so for whatever reasons the defense might offer.

The federal district courts and courts of appeals must frequently consider whether there is or was manifest necessity for a mistrial in light of a purported jury deadlock.[15] They are, at present, without guidance from this Court about whether a material deviation from Rule 26.3 compels the conclusion that a mistrial was not supported by manifest necessity. Two courts of appeals have now held that Rule 26.3, although phrased in mandatory language, is essentially aspirational and that

---

[15] *See, e.g., United States v. Charlton*, 502 F.3d 1 (1st Cir. 2007); *United States v. Altieri*, 278 Fed.Appx. 53 (2d Cir. 2008); *United States v. Keene*, 287 F.3d 229 (1st Cir. 2002); *Razmilovic*, 507 F.3d 130 (2d Cir. 2007); *Wecht*, 541 F.3d 493 (3d Cir. 2008); *United States v. Mark*, No. 08-1177, 2008 WL 2673869 (3d Cir. July 9, 2008); *Allick*, 274 Fed.Appx. 128 (3d Cir. 2008); *Berroa*, 374 F.3d 1053 (11th Cir. 2004); *United States v. Vaiseta*, 333 F.3d 815, 818 (7th Cir. 2003); and *United States v. Sybal*, 468 F. Supp.2d 219 (D. Me 2007).

compliance with its requirements is only one factor to be considered on appeal.

This case presents a particularly appropriate vehicle for the Court to examine the first issue presented in the petition. The Third Circuit correctly held that the district judge failed entirely to meet the requirements of Rule 26.3. Here, the district judge did not merely fail to seek counsel's position; he expressly muzzled counsel by declaring at the beginning of the mistrial proceeding that counsel could not speak, offer motions or assert objections. Similarly, the district judge did not consider or consult with counsel about any alternatives to a mistrial.[16] Instead, the trial judge first confirmed that the government would immediately retry Dr. Wecht – and did so in the presence of the jury *before* he declared a mistrial. Still, the Third Circuit purported to find manifest necessity based on its own review of the scant record, and it held that Rule-26.3 compliance was just one among many factors. Thus, this case cleanly presents the first legal issue Dr. Wecht asks the Court to review.

---

[16] Dr. Wecht asserted before the Third Circuit that one alternative the district judge should have considered on the day in question was to offer a partial-verdict instruction. The phrasing of the final jury note clearly suggested clearly that the jury may have believed it had to reach a verdict on *all* counts. Had the district judge given such a charge, the jury might well have returned verdicts on at least some of the 41 counts of the indictment such that Dr. Wecht would not face retrial on all of them. The Third Circuit's response to that point was to assert, incorrectly, that the district judge in fact offered a partial jury instruction. *See Wecht*, 541 F.3d at 509. (Appx A at 35a-36a) The appeals court's statement was factually inaccurate. The Third Circuit's model criminal jury instructions include a partial-verdict instruction. As noted, the district judge never delivered it or any instruction with a similar meaning.

II. THIS COURT SHOULD CLARIFY AND MAKE CONSISTENT ITS DOUBLE JEOPARDY JURISPRUDENCE BY HOLDING THAT, WHERE A JURY REACHES A DEADLOCK AFTER THE GOVERNMENT HAS HAD A FULL AND FAIR OPPORTUNITY TO PRESENT ITS CASE, JEOPARDY TERMINATES AND THERE CAN BE NO RETRIAL.

In *United States v. Perez,* 22 U.S. (9 Wheat) 579 (1824), the Court held that a defendant in a capital offense case could be retried following the discharge of the original jury without the consent of the accused. The Court held as follows:

> We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.

22 U.S. (9 Wheat) at 580. In the 184 years since *Perez,* a decision less than a page in length and with no legal citations, the Court has relied on it for two points of law: (1) that there must be "manifest necessity" for a mistrial in a criminal case in order for there to be a retrial and (2) that a genuinely deadlocked jury presents a circumstance of manifest necessity allowing a retrial. Indeed, the Court has repeatedly recited the second point with no analysis of its correctness but only a citation to *Perez.* Moreover, although *Perez* never referred to the Double Jeopardy Clause, the Court's subsequent

opinions have treated it as though it had. Consider the following examples:

- In *Logan v. United States*, 144 U.S. 263 (1892), another complex murder case, the Court rejected a claim of multiple jeopardy, slightly rephrasing *Perez* as holding that "whether the discharge of the jury was manifestly necessary in order to prevent a defeat of the ends of public justice, was a question to be finally decided by the presiding judge in the sound exercise of his discretion." *Id.* at 297.

- In *Dreyer* v. *Illinois*, 187 U.S. 71 (1902), the Court again was content to rely on *Perez*, stating that *Perez* had been reaffirmed in *Logan* and other cases decided by the Court since *Perez*.

- In *Keerl* v. *Montana*, 213 U.S. 135 (1909), the Court allowed a retrial after a purportedly hung jury and erroneously asserted that, in *Perez*, Court "passed upon the question arising under the Fifth Amendment").

- In *Wade v. Hunter*, the Court explained that "[t]he rule announced in the *Perez* case has been the basis for all later decisions of this Court on double jeopardy" 336 U.S. 684, 690 (1949). The Court in *Wade* further expressed the view that precluding a second trial following the failure of the jury to reach a verdict would frequently frustrate the purpose of the law to protect society from those guilty of crimes. Somewhat inconsistently, the Court in *Wade* also recognized for the first time that

the defendant had a valued right to have his trial completed by a particular tribunal and that such a right was an element of the Double Jeopardy Clause.

- In *Arizona v. Washington*, the Court wrote in *dictum* that one example of manifest necessity is a "mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict, long considered the classic basis for a proper mistrial." 434 U.S. at 509.

- In *Richardson v. United States*, 468 U.S. 317, 323 (1984), the Court again pointed to *Perez* for the rule that a failure of the jury to agree on a verdict was an instance "of manifest necessity" which permitted a trial judge to terminate the first trial and retry the defendant, because the "ends of public justice would otherwise be defeated."

Simply put, the Court early on read *Perez* to hold that a retrial after a genuinely deadlocked jury does not offend the Double Jeopardy Clause even though the policies of that constitutional provision had not been fully articulated at the time of *Perez*.

There is a significant historic inaccuracy in the Court's repeated references to *Perez* and ample reason for this Court to examine the continued viability of relying on *Perez* to permit serial trials when the government fails to convince a jury of guilt.

First, *Perez* was not a double-jeopardy case. Its text includes no references to the Double Jeopardy Clause, the Fifth Amendment or even the Constitution. As Justice Powell wrote in dissent in *Crist v. Bretz*, 437 U.S. 28 (1978), *Perez* dealt with a

then-accepted common-law rule of jury practice that a jury, once sworn, could not be discharged. 437 U.S. at 44 (Powell, J., dissenting).

There is a second, and related, reason to conclude that *Perez* did not address the Double Jeopardy Clause. At the time the Court decided *Perez*, American law followed British common law, which held that jeopardy only attached when the jury rendered a verdict. *See Crist*, 437 U.S. at 29-30. However, more than a century after *Perez*, the Court held that, for purposes of the Double Jeopardy Clause, jeopardy attaches when the jury is sworn at the outset of the trial. *See Downum*, 372 U.S. 734.

That change and the articulated policies behind that change are critical. *Perez* was a deadlocked-jury case. Given the then-current understanding that jeopardy only attached when there was a verdict, if the Court were considering *Perez* in the context of the Double Jeopardy Clause, it would have had no reason to set out its "manifest necessity" standard. It would simply have held that jeopardy never attached. The "manifest necessity" formulation dealt not with double jeopardy but with the common-law rule against discharging a jury before it reached its verdict.

The majority in *Crist* conceded the possibility that *Perez* had been misconstrued. 437 U.S. at 34 n.10 ("In fact, a close reading of the short opinion in that case could support the view that the Court was not purporting to decide a constitutional question, but simply settling a problem arising in the administration of federal criminal justice. But to cast such a new light on *Perez* at this late date would be of academic interest.").

The issue should raise far more than "academic interest." The historic misunderstanding of *Perez* has created an obvious and irreconcilable inconsistency in the Court's double-jeopardy jurisprudence.

The Court's modern double-jeopardy jurisprudence rests on three principles: a defendant has a constitutional right not to be placed in jeopardy more than once and a constitutional right to have his trial completed before the tribunal that first began to hear the evidence, and the government has an interest in having one, full opportunity to convince a jury to convict.

In *Arizona v. Washington*, the Court described the rationales underlying the Double Jeopardy Clause:

> Because jeopardy attached before the judgment becomes final, the constitutional protection also embraces the defendant's "valued right to have his trial completed by a particular tribunal." The reasons why this "valued right" merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is

> aborted before it is completed. *Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.*

434 U.S. at 503-4 (emphasis added) (*quoting Jorn*, 400 U.S. at 484).

As noted, in *Wade*, the Court for the first time held that a criminal defendant has a constitutional right to have his trial completed before a particular tribunal. 336 U.S. at 689. In *United States v. Green*, 355 U.S. 184 (1957), the Court amplified the policies underlying the right to have the trial completed by a particular tribunal announced in *Wade* and held that "[t]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Id.* at 187-88.

In *Crist*, the Court held that the defendant's right to have his trial completed by a particular tribunal and to avoid the ordeal of a second trial lies at the heart of the constitutional rule that jeopardy attaches when a jury is empanelled and sworn. 437 U.S. at 35-36.

For the most part, the Court's recent cases harmonize these three principles.

Consider *Illinois v. Somerville*, 410 U.S. 458 (1973). The Court reviewed an Illinois case in which a jury was sworn but, before it heard any testimony,

the prosecutor recognized a fatal defect in the indictment. The trial judge aborted the trial, the prosecution obtained a new, correct indictment and the defendant was convicted in a second trial. This Court considered whether the second trial violated the Double Jeopardy Clause, and it concluded that it did not. At least in the context of recognizing that the government should have one clear opportunity that was a rational result. The prosecution did not have a full chance to require the defendant to stand trial. *See also, Gori v. United States*, 367 U.S. 364 (1961) (judge declared a mistrial before government concluded its case).

Likewise, in *Arizona v. Washington*, the judge declared a mistrial because of defense counsel's misconduct in his opening statement. Such conduct, and the declaration of a mistrial necessitated by it, deprived the government of its one complete opportunity to require the accused to stand trial. Thus, this Court ruled that the Double Jeopardy clause did not prevent another trial.

While the results in those cases are consistent with the Court's recognition of society's interest in permitting the government its one clear opportunity to require the accused to stand trial, the deadlocked-jury cases are not consistent with either the government's recognized interest in "one, and only one" opportunity to require the accused to stand trial or, more importantly, the defendant's rights to be free of serial prosecutions and to have one tribunal consider the evidence against him. Indeed, this Court has not attempted to reconcile this inconsistency, stating only in summary fashion in *Arizona v. Washington* that permitting a second trial after a deadlocked jury "accords recognition to society's interest in giving the prosecution one

complete opportunity to convict those who have violated its laws." *Id.* at 509. The Court offered no real analysis of why the original trial did not offer that complete opportunity to convict.

What has evolved is a discordant doctrine that operates to give the government more than one clean shot at the accused even though the government has, by definition, not met its constitutional burden of proving guilt beyond a reasonable doubt to a unanimous jury. In a deadlocked-jury situation, the prosecution has just the same sort of opportunity to obtain a conviction as it does when the jury acquits. The only difference is that, in the acquittal scenario, the jurors reach a verdict and, in the deadlock scenario, they do not – but, in both, the government had a full opportunity and could not convince the jurors to convict.

The Court has nonetheless held to an erroneous articulation of the holding in *Perez*. It has never revisited or re-analyzed why that rule should apply or how it can be reconciled on principled terms with the Court's subsequent pronouncements that the purposes of double-jeopardy protection are to ensure that the government gets one complete chance at securing a guilty verdict while at the same time protecting citizens from multiple prosecutions.

This case offers a textbook example of the factors militating against serial prosecutions recognized in this Court's jurisprudence.

The government had an undeniably full and fair opportunity to convince a jury to convict Dr. Wecht of any one of 41 counts. During a seven-week trial, the government offered nearly four dozen witnesses and introduced thousands of pages of

exhibits. The defense rested without calling a single witness after challenging the government's case through cross-examination. Thus, the jury had before it only the testimony of the government's witnesses and almost exclusively the government's other evidence. Yet the jury did not find Dr. Wecht guilty on even one of the 41 counts submitted to it. The government clearly had the one complete "opportunity" to which *Arizona v. Washington* refers, and it was not able to persuade a jury that it had met its burden of proof. Now, Dr. Wecht may be forced to endure a retrial, a proceeding that will subject him to all of the ills described in *Arizona v. Washington:* financial and emotional burden, stigma and the risk of an erroneous conviction.

That result makes no sense in light of the Court's more recent explanation that the government's interest is in having one full opportunity to convict and that jeopardy attaches at jury selection, not verdict. The only reason to permit a second trial under such circumstances is to give the government a second chance at obtaining a guilty verdict with a different jury – a notion that is incompatible with the recognized protections of the Double Jeopardy Clause.

The reason the deadlocked-jury cases are so discordant with the rest of the Court's current double-jeopardy jurisprudence is the repeated and mistaken reliance on *Perez* for the rule that a genuinely deadlocked jury always presents manifest necessity for a mistrial such that a retrial would not offend the Double Jeopardy Clause.

The Court should use this case as the vehicle to reexamine the assumed holding in *Perez* in light of the Court's more fully developed double-jeopardy

jurisprudence in the 184 years since the Court decided *Perez*.[17] This case presents the issue in its clearest – and most troubling – setting.

CONCLUSION

The Court should grant this petition for a writ of *certiorari*.

David R. Fine
K&L GATES LLP
Market Square Plaza
17 North Second St.
18th Floor
Harrisburg, PA 17101
(717) 231-4500

Jerry S. McDevitt
(Counsel of Record)
Richard L. Thornburgh
Mark A. Rush
K&L GATES LLP
Henry W. Oliver Bdg.
535 Smithfield Street
Pittsburgh, PA 5222
(412) 355-6500

Counsel for Petitioner
Cyril H. Wecht

October 2008

---

[17] Dr. Wecht did not ask the court of appeals to reexamine the vitality of the deadlocked-jury holding of *Perez* because, of course, the court of appeals had no authority to reconsider this Court's precedent. That poses no barrier to this Court's review of the issue. *See Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982) (the Court may review purely legal questions even if not considered by court of appeals); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (same).